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In The

Supreme Court of the United States

October Term, 1987

MICHAEL L. SHAKMAN and PAUL M. LURIE, *et al.*,
Petitioners,

v.

GEORGE W. DUNNE, President of the Board of Commissioners of Cook County, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is it constitutional for the State to condition hiring for public jobs on active political support of a single favored political organization to such an extent that competing candidates are placed at a substantial electoral disadvantage?

2. Are rights of association and speech of disfavored candidates (and their voter-supporters) abridged by the State's policy of excluding from public employment anyone who openly supports those candidates?

3. Do disfavored candidates and voters, whose interests are materially impaired by a politically conditioned hiring system, have standing to claim that it violates their constitutional rights?

LIST OF PARTIES

Petitioners are Michael L. Shakman and Paul M. Lurie, individually and on behalf of the classes of independent candidates (not candidates of a regular party organization) and their voter-supporters, in Cook County, Illinois. Respondents are George W. Dunne, individually, as President of the Board of Commissioners of Cook County, and as Chairman of the Democratic Party County Central Committee for Cook County; Stanley J. Kusper, individually and as Clerk of Cook County; Thomas C. Hynes, individually and as Assessor of Cook County; the Forest Preserve District of Cook County; and the Democratic Party County Central Committee for Cook County and its members. These are all of the parties to the case in the court of appeals, from which review is sought.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Michael L. Shakman and Paul M. Lurie, individually and on behalf of classes of independent candidates and voters, respectfully petition that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered August 5, 1987.

OPINIONS BELOW

The opinion of the United States District Court granting petitioners' motion for summary judgment on liability as to respondents' patronage hiring practices is reported at 481 F. Supp. 1315 (N.D. Ill. 1979). Findings of fact concerning those practices were entered with that opinion but not published. Final declaratory and injunctive relief concerning respondents' hiring practices was entered by the district court on April 4, 1983, and is reported at 569 F. Supp. 177. The decision of the court of appeals, reversing that judgment and dismissing petitioners' patronage hiring claims, is reported at 829 F.2d 1387. These opinions and judgments are set forth in the separately bound appendix to this Petition.

JURISDICTION OF THE COURT

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review, by writ of certiorari, the judgment of the United States Court of Appeals for the Seventh Circuit, which was entered on August 5, 1987. Petitioners' request for rehearing was denied on September 30, 1987.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, art. III, section 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of The United States, . . .

Constitution of the United States, first amendment:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, fourteenth amendment, section 1:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case concerns the extensive patronage hiring system which characterizes the political process in Cook County, Illinois. By that system hiring for many thousands of public jobs is conditioned on active political support for a single political group – the Cook County "regular" Democratic organization. Persons who openly support competing candidates are excluded from consideration for those jobs.

This case, brought on behalf of classes of independent candidates and their voter-supporters, seeks declaratory and injunctive relief with respect to defendants' patronage hiring practices. It is brought on the ground that the patronage hiring system is so extensive that it materially burdens the ability of disfavored candidates and voters to obtain support and purposefully places them at a substantial electoral disadvantage. The district court concluded that this violates petitioners' rights to freedom of association and speech, and to equal protection of the law, as guaranteed by the first and fourteenth amendments. Jurisdiction for the case is founded on 28 U.S.C. § 1331 (general federal question jurisdiction) and 28 U.S.C. § 1343(3) (civil rights).

The Complaint

The judgment of the court of appeals reversed the district court and dismissed petitioners' patronage hiring claims without an evidentiary hearing. Accordingly, particular attention to the allegations of the complaint and to petitioners' factual submissions is required.

The complaint is brought by petitioners Michael L. Shakman, an independent candidate (not supported by the "regular" organization of a political party) for delegate to the Illinois Constitutional Convention, and by Paul M. Lurie, a voter and one of Mr. Shakman's supporters. It is brought by them individually and on behalf of classes of independent candidates for public office in elections in Cook County, and of their voter-supporters.

The defendants include local governmental employers who, the complaint alleges, have acted in concert to condition jobs on active support of the "regular" Democratic organization. Among these defendants are the City of Chicago, its park district, various elected officials of Cook County government (including the President of its Board of Commissioners, the State's Attorney, the County Clerk, the Sheriff, the Assessor, the Treasurer and the Clerk of the local Circuit Court) and the county's Forest Preserve District. The Democratic County Central Committee of Cook County, a party organization, and its members are also defendants.

The complaint alleges that defendants and their predecessors have long maintained an employment system in which getting and keeping many thousands of public jobs depend on providing active political support for the favored party organization. This includes making financial "contributions" to that organization (often a percentage of an employee's salary) and doing precinct political work on behalf of officially favored candidates for public office. The jobs are not policy making positions but are generally of a labor, clerical or ministerial nature (such as truck drivers, hospital workers and tax clerks). Political considerations are not just "taken into account"; jobs are conditioned on political support. Persons who openly support competing candidates are excluded from consideration for those jobs. [Appendix, 46a]

This system of politically conditioned employment is alleged to burden the ability of independent candidates and their voters to obtain political support. By excluding those who would openly support disfavored candidates from consideration for public employment, the State significantly hampers the ability of those disfavored candidates and voters to enlist support and to make known their views. [47a]

It is also alleged that this patronage system discriminates against petitioners by granting favored candidates

of the "regular" organization a substantial electioneering advantage. The system produces a vast assembly of precinct workers, as well as a large campaign treasury, for candidates of the "regular" Democratic organization. Campaign funds and precinct work are, of course, important to success in elections. The result is a massive electioneering effort in numerous local elections on behalf of the "regular" organization's candidates for public office, all to the substantial disadvantage of competing candidates and their voters. [46a-47a]

The impact of this patronage hiring system on electoral outcomes is alleged to be very significant. Independent candidates are placed at a substantial disadvantage in developing campaign support, especially as constrasted to the massive electioneering effort which the system produces for candidates of the officially favored party organization. For many elections the disadvantage is decisive. For example, Mr. Shakman lost his election by fewer votes than the number of patronage employees in his district. Indeed, the system is alleged to have been instrumental in producing the long-standing dominance of the regular Democratic organization in local elections in Cook County. [46a-47a]

The complaint alleges that defendants' exclusionary employment system abridges petitioners' constitutional rights to freedom of association and speech because it uses the coercive power of the State to prevent disfavored candidates and voters from being able to enlist support. The State penalizes lawful political association by excluding those (including independent voters themselves) who openly support petitioners. Moreover, the system denies petitioners' rights as candidates and voters to equal protection of the law. State power is used to advantage the fortunes of a single political organization by conditioning jobs on active support of its favored candidates, for the purpose of placing petitioners at a substantial competitive disadvantage. [46a-47a]

The Initial Decision Of The Court Of Appeals

The complaint was initially dismissed by the district court. That decision was reversed by the court of appeals in a decision which is not now under review. That decision held that the complaint stated a claim upon which relief may be based concerning misuse of official power over public employees:

> It is clear that at least some aspects of the interests of candidates in an equal chance and of the interests of voters in having an equally effective voice are rights secured from state action by the equal protection clause of the fourteenth amendment.
>
> . . . .
>
> . . . The interest [of candidates and voters] in an equal chance and an equal voice is allegedly impaired in the case before us by the misuse of official power over public employees so as to create a substantial, perhaps massive, political effort in favor of the ins and against the outs. We conclude that these interests are entitled to constitutional protection from injury of the nature alleged as well as from injury resulting from inequality in election procedure.

[38a-39a] Correspondingly, it also held that petitioners had standing to bring those claims. *Id.*

The Initial Consent Decree

Upon remand to the district court, the case was certified as a class action on behalf of the classes of independent candidates for public office in Cook County (that is, candidates not supported by a regular party organization) and of their voter-supporters.

Defendants, including each of the respondents, subsequently agreed to a consent judgment that enjoins defendants from basing or affecting any term or aspect of public employment, with respect to persons *once hired*, upon political reasons or factors (except for certain exempt positions).

That final judgment, which is not now in issue, does not, however, resolve whether petitioners are entitled to relief with respect to defendants' hiring practices. The judgment specifically provided that the court retained jurisdiction to resolve the hiring claim. [121a *et seq.*]

Motion For Summary Judgment

Petitioners then moved for partial summary judgment as to liability with respect to defendants' continuing patronage hiring practices.

The basic facts of the case are not in issue. Defendant public employers admit (in a series of stipulations and responses to requests for admissions) that hiring for at least 20,000 local public jobs in Cook County is based or conditioned on active support of the "regular" Democratic organization. In fact, respondents themselves admit that hiring for the majority of jobs under their jurisdiction is politically based. [According to the current county budget, respondents alone employ about 15,000 persons.] To get one of these patronage jobs (or, having one, to get a better position) an applicant or employee must provide or promise active political support for candidates of the "regular" organization. [54a-56a]

Respondents admit, moreover, that persons who in any way openly support independent candidates are excluded from consideration for these jobs. [55a]

Respondents admit that the purpose of the politically conditioned hiring system is to provide a campaign advantage for candidates of the "regular" organization. This, it is admitted, helps those candidates win elections. Officials of the Democratic organization also admitted that their ability to obtain campaign workers needed to win elections depends upon their continued access to politically conditioned hiring for public jobs. [55a-56a]

Affidavits submitted in support of petitioners' summary judgment motion emphasize the extent to which

independent candidates and voters are disadvantaged by the patronage hiring system.[1] In lower visibility local elections, precinct work and campaign funds are especially important to electoral success. Indeed, they are often the most significant factors in determining who wins. The massive patronage hiring system produces large numbers of campaign workers (as well as financial "contributions") for favored candidates (while preventing support for disfavored candidates). It gives favored candidates a substantial and often decisive electioneering advantage over independent candidates who have no patronage jobs to award. This has led to a dominance of the "regular" organization in local elections. [47a-48a, 97a-100a, 149a-150a]

Decision of The District Court

The district court granted summary judgment on liability for petitioners. Extensive findings of fact, based on defendants' stipulations and admissions, describe the operation and effect of the patronage hiring system. The court found that defendants maintain a massive patronage system in which hiring is based on active political support (money and precinct work) for the "regular" Democratic organization. The court found that anyone who has "in any open way been a worker or partisan of any political group opposed to or by the regular Democratic organization of the sponsor" is usually excluded from consideration for patronage jobs. [148a]

The system was found to result in a significant electoral disadvantage to independent candidates.

> The patronage employment system described above helps regular Democrats win elections. It

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[1] Because the court of appeals dismissed petitioners' claims without an evidentiary hearing, the matters set forth in petitioners' supporting affidavits must, at this stage of the case, be taken as true. Rule 12(b), FED. R. CIV. P; *Gardner v. Toilet Goods A'ssn*, 387 U.S. 167, 172 (1967).

> provides a significant advantage in Chicago and in Cook County, Illinois, to candidates supported by the regular Democratic organization and a corresponding disadvantage to opposing candidates. . . .

[149a-150a] This is, of course, its purpose. [55a-56a]

In an extensive analysis of the legal issues, the district court concluded that defendants' political hiring system abridges petitioners' first and fourteenth amendment rights. [109a,119a] The district court concluded that, by excluding those who openly support disfavored candidates from consideration for public employment, the political hiring system unconstitutionally burdens petitioners' freedom of association and speech. It concluded that the intentional use of state power to grant a significant electioneering advantage to a favored political group over competing candidates deprives petitioners of equal protection. By using its coercive power in this way, the State discriminates among candidates and voters solely on the basis of the content of political speech, in violation of the first amendment. [70a-75a]

After a hearing on the proper relief, the district court entered a judgment enjoining defendants from basing hiring on political considerations (except for exempt positions). [151a-161a][2] Seeking to continue their exclusionary hiring practices, respondents appealed from the district court's judgment.

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[2] A number of defendant public employers, including the City of Chicago, its park district and several Cook County officers, have agreed to discontinue their political hiring practices (except for exempt positions). Separate consent decrees supplanting the court's judgment have been entered with respect to these consenting defendants. Those defendants have taken major steps pursuant to the consent decrees to recast their hiring systems so that they are based on factors other than political support. [4a]

The Decision Of The Court Of Appeals As To Which Review Is Sought

The court of appeals reversed the district court's judgment and dismissed petitioners' claims with respect to respondents' hiring practices. [25a] It ruled that, as a matter of law, politically conditioned hiring cannot infringe the rights of candidates and voters. This is because, it concluded, such a system is inherently neutral; whoever wins an election can engage in the same practices. [20a-23a]

The court of appeals also ruled that petitioners do not have standing, as required by the "case" or "controversy" language of the Constitution, to complain of respondents' politically exclusionary hiring practices.[3] The court reasoned that, since many factors influence individual decisions as to political support, no injury to petitioners' interests can be traced with certainty to the State's conduct in conditioning hiring on support of a favored political group. Moreover, the court ruled, since the system does not completely restrict the ability of competing candidates to obtain support, the impact of any burden on petitioners' ability to obtain support is limited. [20a-24a]

REASONS FOR GRANTING THE WRIT

There are two basic reasons *certiorari* should issue in this case. *First*, the substantive issue – the constitutionality of a politically conditioned hiring system that purposefully disadvantages disfavored candidates and their voter-supporters – is of very considerable importance. It involves fundamental rights to a free and competitive political process which are at the heart of our constitutional system. And the actual, practical impact is significant, as practices

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[3] The court concluded that its earlier decision in the case was not determinative of the issue because it did not deal with patronage *hiring* practices and because the law of standing had been recast since that decision.

similar to those in issue here affect the rights of millions of voters and hundreds of candidates in numerous local elections around the country to a free and competitive electoral system.

Second, the holding of the court of appeals that the case is not justiciable presents an issue which should be resolved by this Court. The holding would bar judicial consideration of the burdens on political competition imposed by any system of patronage hiring, no matter how extensive. Moreover, the rationale of the decision of the court of appeals would expand the standing requirement to establish a barrier to judicial consideration of virtually all claims concerning state action burdening political competition. The decision, with its narrow vision of judicial authority, thus raises fundamental questions as to the ability of the judiciary to protect constitutional rights concerning the political process.

I. THE CONSTITUTIONALITY OF PATRONAGE HIRING THAT SIGNIFICANTLY BURDENS POLITICAL COMPETITION IS IMPORTANT FOR RESOLUTION BY THIS COURT.

This Court has twice in recent years considered the constitutionality of patronage employment practices. In *Branti v. Finkel*, 445 U.S. 507 (1980), and *Elrod v. Burns*, 427 U.S. 347 (1976), this Court held that the firing of public employees because of party affiliation is unconstitutional.

The opinions in those cases strongly indicate that politically conditioned *hiring* is of doubtful constitutionality, especially when conducted on a scale which affects the electoral process.[4] The holdings in those cases, however, were

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[4] In *Branti*, the opinion of the Court noted that "it is difficult to formulate any justification for tying *either the selection or retention* of an assistant public defender to his party affiliation." 445 U.S. at 520 n.14 (emphasis supplied). The dissent cited this

(Footnote continued on the following page)

limited to the legality of political discharges. The issue presented here – the constitutionality of a system of patronage hiring that is designed to burden political competition – has not been clearly resolved by this Court.[5]

This case squarely presents that issue. The district court found the system of political hiring in Cook County to be so extensive as to have a significant effect on the results of elections. Thus, this case concerns the situation in which the impact of a system of politically conditioned hiring is most critical – where it affects the free functioning of the democratic process. The case is particularly suitable for review since it affords the Court an opportunity to review the constitutionality of patronage hiring insofar as it burdens the electoral system, without necessarily reaching the question whether isolated or individual instances of politically motivated hiring decisions are lawful.

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4 *(Continued)*
footnote in concluding that the decision "further limits the relevance of political affiliation to the *selection* and retention of public employees." *Id.* at 521 (emphasis supplied). *See also id.* at 522 n.2. The plurality opinion in *Elrod* also commented on the adverse effect patronage hiring practices may have on the democratic process. *Elrod*, 427 U.S. at 356, 369-70.

[5] Numerous law review articles conclude that political hiring is unconstitutional. *See, e.g.*, Comment, *Patronage and the First Amendment After Elrod v. Burns*, 78 COLUM. L. REV. 468, 476 (1978) ("Patronage hiring skews the electoral process by encouraging job applicants to affiliate with the incumbent party"); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 195 (1976) ("[I]n the hiring context, every applicant for every job is subject to such coercion"); Comment, *First Amendment Limitations on Patronage Employment Practices*, 49 U. CHI. L. REV. 181, 200 (1982); Note, 29 EMORY L. J. 1217 (1980); Comment, *Republicans Only Need Apply: Patronage Hiring and The First Amendment in Avery v. Jennings*, 71 Minn. L. Rev. 1374 (1987).

The treatment of the issue in the lower courts is diverse. *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 106 S. Ct. 3276 (1986), holds that only hiring based solely on politics is unconstitutional. In *Rosenthal v. Rizzo*, 555 F.2d 390, 392

(Footnote continued on the following page)

A. Fundamental Rights Concerning A Free And Competitive Electoral System Are At Issue.

Politically conditioned hiring by the State, where extensive, affects constitutional rights with respect to the electoral process in two important ways. First, by excluding anyone who openly supports independent candidates from consideration for employment, the State purposefully burdens the ability of those candidates to obtain support (as well as the ability of independent voters to give that support), all in violation of their freedom of association and speech. Second, by providing campaign assistance solely for a favored political group, the State denies the equal protection of the law to competing candidates and their voter-supporters.

1. Freedom of association and speech of disfavored candidates and their voters is abridged when the State uses its coercive power to prevent active support of those candidates.

The imposition by the State of discriminatory burdens on the ability of disfavored candidates and voters to

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5 *(Continued)*

(3d Cir.), *cert. denied,* 434 U.S. 892 (1977), the Third Circuit stated that political hiring is unconstitutional. A different panel subsequently indicated that this was *dictum* and not binding. *Mazus v. Dept. of Transp.*, 629 F.2d 870 (3d Cir. 1980), *cert. denied,* 449 U.S. 1126 (1981). District courts are in disagreement. A number of cases hold that political hiring is unconstitutional: *Indiana State Employees Ass'n v. Indiana Republican State Cent. Comm.*, 630 F. Supp. 1194 (S.D. Ind. 1986); *Gomez v. South Bend,* 605 F. Supp. 1173 (N.D. Ind. 1985); *Torres v. Grunkmeyer,* 601 F. Supp. 1043, 1047 (D. Wyo. 1984); *Cullen v. New York State Civil Service Comm'n,* 435 F. Supp. 546, 551-52 (E.D. N.Y.), *appeal dismissed,* 566 F.2d 846 (2d Cir. 1977). On the other hand, *Rutan v. Republican Party,* 641 F. Supp. 249 (C.D. Ill. 1986) (appeal pending), and *Messer v. Curci,* 610 F. Supp. 179 (E.D. Ky. 1985) (appeal pending), reach the opposite result.

enlist active support violates their basic freedom of association and speech. As this Court has repeatedly affirmed, rights of political association of citizens are abridged when the State burdens the ability of others to associate with them. It takes two to associate. For example, in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958), this Court held that burdens which "dissuade others from joining" a group abridge the first amendment rights of group members. *See also Tashjian v. Republican Party*, ___ U.S. ___, 107 S. Ct. 544 (1986), where this Court recently held that freedom of political association of voters who are party members is abridged by the State's exclusion of independent voters from the party's primary elections.

A significant burden is imposed on the rights of independent candidates (and their voters-supporters) when the State excludes those who openly support them from the opportunity for public employment. The ability of those disfavored candidates and voters to enlist support or to express views is thus significantly burdened. Independent voters know that if they provide open support for independent candidates, they will be black-listed. This is a particularly effective method for the State to control political association and speech. Jobs are important to people; employment opportunity is not easily given up for the sake of a campaign.

The plurality opinion in *Elrod* recognized this impact of political hiring on first amendment rights:

> Conditioning public employment on partisan support *prevents support of competing political interests*. Existing employees are deterred from such support, *as well as the multitude seeking jobs*.
>
> . . . .
>
> . . . [P]atronage is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government.

427 U.S. at 356, 369-70 (emphasis supplied). The district court found that respondents' patronage hiring system has precisely that effect in terms of burdening petitioners' rights of association and speech. [70a-74a]

2. Equal protection is denied when the State uses its control over employment to tip the electoral scales.

For the electoral system to be free and competitive, it is essential that the State not tip the electoral balance by providing electioneering assistance solely for candidates it favors. *Buckley v. Valeo*, 424 U.S. 1, 99 (1976). Politically conditioned hiring, where substantial, however, has precisely that discriminatory effect. As the plurality opinion in *Elrod* observed:

> It is not only belief and association which are restricted where political patronage is the practice. The free functioning of the electoral process also suffers.... Patronage thus tips the electoral process in favor of the incumbent party, and where the practice's scope is substantial relative to the size of the electorate, the impact on the process can be significant.
>
> . . . .
>
> ... Patronage can result in the entrenchment of one or a few parties to the exclusion of others.

427 U.S. at 356, 369. This point in *Elrod* was summarized in the Court's opinion in *Branti*: "[A] patronage system may affect freedom of belief more indirectly, by distorting the electoral process." 445 U.S. at 513-14 n.8.

In contrast to the analysis in *Elrod*, the decision of the court of appeals asserts that politically conditioned hiring is, as a matter of law, politically neutral. This is said to be true because any candidate who wins elections can engage in the same practices. [20a] This reasoning is amiss. An extensive political hiring system, with various employers acting in concert, plainly favors the political faction that controls the jobs. That is its whole point – to use control

over jobs to keep the "outs" from ever becoming the "ins."

In any event, it hardly can be maintained that equal protection of the law may be achieved merely because anyone able to get the upper hand can engage in similar discriminatory conduct. Such an argument would be available to defend almost any discriminatory practice.

B. The Issues Are Important To The Rights Of Millions Of Voters In Numerous Elections Around The Country.

The considerable practical significance of patronage hiring practices makes the case particularly important for resolution by this Court. The issues presented by the present case have broad national applicability. Political life in a number of jurisdictions, especially in cities in the East and in parts of the Midwest, is characterized by extensive use of patronage hiring, with jobs conditioned on political support. *See, e.g.*, R. Wolfinger, *Politics of Progress* at 87-92 (1974); Wolfinger, *Why Political Machines Have Not Withered Away and Other Revisionist Thoughts*, 34 J. POL. 365 (1972). Extensive patronage hiring systems reduce political competition, burden opportunities of disfavored candidates to attract support and tip the electoral scales.

The issues in this case thus affect the rights of millions of voters in jurisdictions around the country to a free electoral system. The outcomes of hundreds of elections for countless local governmental positions are affected by the practices in issue in this case.

II. THE DECISION OF THE COURT OF APPEALS WOULD INSULATE FROM JUDICIAL REVIEW STATE ACTIONS WHICH BURDEN SUPPORT OF DISFAVORED CANDIDATES AND VOTERS OR WHICH PURPOSEFULLY FAVOR CANDIDATES OF A SINGLE POLITICAL GROUP.

The holding of the court of appeals that petitioners do not have standing presents an exceptionally important

issue that should be resolved by this Court. It constitutes a ruling that patronage hiring cannot abridge constitutional rights of disfavored candidates and voters – no matter how much such a system in fact burdens electoral opportunity. Moreover, the rationale of the decision would expand the standing requirement to exclude judicial consideration of a wide range of state practices designed to tip the electoral scales or to burden the ability of disfavored groups to enlist support. The case thus presents basic issues as to the extent to which the standing requirement constitutionally restricts the judiciary from protecting rights to a free political process.

Petitioners plainly have standing under prevailing law, rooted in the "case" or "controversy" language of article III of the Constitution. The allegations of the complaint (as well as the findings of the district court) describe in detail the substantial injury to the interests of disfavored candidates and voters that is the direct result of respondents' patronage hiring system. For example, petitioners' ability to enlist campaign support is materially disadvantaged by respondents' practice of excluding from consideration for public employment anyone (including members of the class of independent voters) who openly supports independent candidates.

The system further puts disfavored candidates and voters at an electoral disadvantage by providing massive electioneering support for candidates favored by the "regular" party organization. Respondents admit that the purpose of the system is precisely to give that advantage to favored candidates over petitioners. As the complaint alleges, and the district court found, the disadvantage to disfavored candidates is substantial and, indeed, often decisive in electoral outcomes.

The court of appeals ruled, however, that petitioners lacked standing because, it asserted, no injury to candidates and voters could be traced with sufficient certainty

to politically conditioned hiring. It did not dispute that the patronage hiring system may place petitioners at an electioneering disadvantage. It reasoned, however, that the effects of the political hiring system may be outweighed by other legitimate factors affecting individual decisions as to political support. And, with respect to burdens imposed by the system on petitioners' own abilities to obtain support, the court noted that such support was not "completely" restricted; petitioners can still seek support from voters disinterested in the possibility of public employment.[6] [20a-24a]

The decision of the court of appeals is thus not so much a decision that petitioners are not injured by the system. It is, rather, a ruling that candidates and voters have no constitutional rights which can be impaired by a system of politically conditioned hiring, no matter how extensive, because the disadvantage can in some cases be overcome.

The direct effect of the decision is to preclude judicial review of the effect of any system of patronage hiring on the rights of candidates and voters, regardless of the extent of its actual impact. The decision thus excludes from review a practice whose "impact on the political process" has been described as "at war with the deeper traditions of democracy embodied in the First Amendment" in instances in which that impact is most significant. *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 576 (7th Cir. 1972) (Stevens, J.), *cert. denied*, 410 U.S. 928 (1973).

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[6] The court considered any injury speculative because any political activity produced by patronage hiring was said to depend on numerous "independent" decisions of patronage employees (or applicants). This wholly misapprehends the case. Decisions of patronage employees and applicants to provide political support are hardly *independent;* they are *required* by the State. Nor is the result speculative. Political work is a job requirement. Moreover, petitioners' ability to obtain support is burdened regardless of support produced for officially favored candidates.

This result is flatly contrary to existing decisions of the Court. Voters have been held entitled to challenge state burdens on the ability of other persons to associate with them (quite apart from any showing of actual electoral harm). *Tashjian v. Republican Party*, ___ U.S. ___, 107 S. Ct. 544 (1986). Since *Baker v. Carr*, 369 U.S. 186 (1962), voters have been held to have standing to challenge state established competitive disadvantages in the electoral system. This has been explicitly held to apply to state created electioneering disadvantages. *Buckley v. Valeo*, 424 U.S. 1 (1976).

The court of appeals' decision, moreover, has more far reaching application. It would expand the standing requirement to establish a significant barrier to judicial consideration of a wide range of state practices concerning the electoral process. The court's conclusion that no injury can be traced to the practices in issue because their effect may be outweighed by other factors would apply as well to virtually all state efforts to advance the electoral fortunes of favored candidates. It would exclude judicial consideration of state granted electoral advantages unless they are so severe as to be essentially impossible to overcome. This would give the State enormous leeway purposefully to deny to the political process (and more generally to the marketplace of ideas) a "level playing field."

Similarly, the court's conclusion that standing does not exist to challenge state-imposed burdens on support of disfavored candidates because that support is not "completely restricted" has broad application. The court's analysis would exclude judicial review of virtually all burdens imposed on a candidate's ability to garner support short of banning a candidancy completely.

This narrowing of the range of justiciability would exclude judicial consideration precisely when it is most important. State actions which burden association with disfavored groups or which tilt the electoral scales for

favored parties tend to be self-perpetuating in nature, not easily susceptible to electoral correction. *Baker v. Carr*, 369 U.S. 186 (1962). Protection of the democratic political process from such burdens is a key responsibility of the federal judiciary. *The Federalist* No. 78 (A. Hamilton).

In a long series of cases since *Baker v. Carr*, this Court has considered the constitutionality of a variety of constraints on the free functioning of the political process. The decision of the Seventh Circuit, however, expands the standing requirement to establish a free-floating barrier against claims that the State unconstitutionally burdens support for disfavored candidates or provides electioneering assistance only for a favored political organization. Review by this Court is needed to consider whether the "case" or "controversy" requirement is now to be interpreted to exclude from judicial review practices, such as those involved here, which profoundly impair the free functioning of the electoral process.

CONCLUSION

For these reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Seventh Circuit to review the questions presented by this Petition.

Respectfully submitted,

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